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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. THOSE SECTIONS OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 WHICH ATTEMPT TO REGULATE POST-MINING LAND USE ASPECTS UNRELATED TO ENVIRONMENTAL CONTROL ARE NOT WITHIN THE COMMERCE CLAUSE AUTHORITY OF CONGRESS, AND ARE VIOLATIVE OF THE TENTH AMENDMENT	9
A. Once mining is completed, the sole rational basis for Commerce Clause jurisdiction lies in environmental impacts on interstate commerce	9
B. Many of the SMCRA post-mining land use requirements bear no relation to environmental protection, and are therefore invalid as not rationally adapted to the sole basis for Commerce Clause jurisdiction during this period	13
C. The SMCRA post-mining land use requirements, even if within the Commerce power, are violative of the Tenth Amendment as impairments on an attribute of State sovereignty	15

PAGE

II. THE SMCRA ABSOLUTE PROHIBITIONS ON SURFACE COAL MINING ARE NOT WITHIN THE COMMERCE CLAUSE AUTHORITY OF CONGRESS, AND ARE VIOLATIVE OF THE TENTH AMENDMENT 16

III. FIFTH AMENDMENT DUE PROCESS IS VIOLATED BY THE CIVIL PENALTY PROVISION OF SMCRA WHICH REQUIRES THAT ALL PROPOSED ASSESSMENTS BE PREPAID IN ESCROW AS A CONDITION PRECEDENT TO CONTESTING EITHER THE PENALTY AMOUNT OR THE UNDERLYING VIOLATION OF A CITATION 20

A. The escrow provisiqt constitutes a substantial deprivation of private property 21

B. There is no governmental interest served by the SMCRA civil penalty escrow provision 23

C. The informal "assessment conference" provided by the Office of Surface Mining does not substitute for the required Fifth Amendment hearing 24

CONCLUSION 26

APPENDIX 12

TABLE OF AUTHORITIES

Cases

	PAGE
Armstrong v. Manzo, 380 U.S. 545 (1965)	24
Carter v. Carter Coal Co., 298 U.S. 238 (1935)	9
United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1921)	9
Fuentes v. Shevin, 407 U.S. 67, 88 (1972)	21
Goldberg v. Kelly, 397 U.S. 254 (1970)	21
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964)	9, 11, 18
In Re Permanent Surface Mining Regulation Litigation, Civil Action 79-1144, 14 ERC 1083 (D.D.C. Feb. 26, 1980) and Slip Opinion (May 16, 1980), appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980)	14, 24
Katzenbach v. McClung, 379 U.S. 294, 303-304 (1964)	9, 11
Kidd v. Pearson, 128 U.S. 1 (1888)	9
Matthews v. Eldridge, 424 U.S. 319 (1975)	20, 21, 24
National League of Cities v. Usery, 426 U.S. 833, 845 (1976)	10, 15
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936)	9
Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1922)	9
Schecter Poultry Corp. v. U.S., 295 U.S. 495 (1934)	9
Sniadatch v. Family Finance Corp., 395 U.S. 337 (1969)	21
Star Coal Co. v. Andrus, Civ. No. 79-171-2 (S.D. Iowa, Feb. 13, 1980) Slip Op. 18-19, appeal pending, No. 80-49	20, 2a

PAGE

U.S. v. Darby, 312 U.S. 100 (1940) 9, 11

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 16

Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980) (probable jurisdiction noted, Nos. 79-1538 and 79-1596 (October 6, 1980)) 1, 3, 6, 10, 13, 20, 23, 25, 2a

Wickard v. Filburn, 317 U.S. 111 (1942) 9, 18

Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975) 16

Constitution, Statutes and Regulations

United States Constitution:

Article I, Section 8 (Commerce Clause) *passium*

Fifth Amendment ..... *passium*

Tenth Amendment ..... *passium*

Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164), 92 Stat. 1290 [30 U.S.C. § 801 et seq.] 19

Occupational Safety and Health Act of 1970 (Pub. L. 91-596), 84 Stat. 1590 [29 U.S.C. § 651 et seq.] 19

Surface Mining Control and Reclamation Act of 1977, (Pub. L. 95-87), 91 Stat. 447:

§ 101(b) [30 U.S.C. § 1201(b)] 10

§ 509 [30 U.S.C. § 1259] 23

§ 510(c) [30 U.S.C. § 1260(c)] 23

§ 510(d) (1) [30 U.S.C. § 1260(d) (1)] 14

§ 515(b) (2) [30 U.S.C. § 1265(b) (2)] 13

§ 518(a) [30 U.S.C. § 1268(a)] 22, 25

§ 518(c) [30 U.S.C. § 1268(c)] 8, 20, 1a

§ 521 [30 U.S.C. § 1271] 25

§ 522 [30 U.S.C. § 1272] 16

PAGE

§ 522(a), (c), (d), (e) (4) & (5) [30 U.S.C. § 1272(a), (c), (d), (e) (4) & (5)] 16
§ 522(b) (4) & (5) and (e) (1), (2), (3) 16
§ 522(e) (5) [30 U.S.C. § 1272(e) (5)] ..7, 17, 18, 19
§ 525 [30 U.S.C. § 1275] 25
Clean Air Act, 42 U.S.C.§ 7401 et seq. 20
Clean Water Act, 33 U.S.C. § 1251 et seq. 20
Laws of Maryland, Chapter 740 (1980) 3
Maryland Annotated Code, Natural Resources Article, § 7-505(b) (2) (v) & (vi) 2, 3, 4
U.S. Code of Federal Regulations:
30 C.F.R. § 732.15(b) (7) 24
30 C.F.R. § 761.5(d) 18
30 C.F.R. § 785.17(d) (1) 14
30 C.F.R. § 840.13(a) 24
30 C.F.R. § 845 24
30 C.F.R. § 845.18 24

Miscellaneous

Conditional Approval of Permanent Program Submission from the State of Maryland Under the Surface Mining Control and Reclamation Act of 1977, 45 Fed. Reg. 79340, 79345 (December 1, 1980), Finding 12.1 ..... 3, 4
Fifty-Seventh Annual Report of the Maryland Bureau of Mines 2
Maryland Manual, 1979-80 2
Senate Report No. 95-128, 95th Cong., 1st Session, p. 59 23
U.S. Department of Agriculture Soil Conservation Service Report entitled "Prime Farmlands of Garrett and Allegany Counties," prepared for the Maryland Bureau of Mines, April 1978 4

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BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Maryland is vitally interested in the instant proceeding before the Court, as well as the companion Virginia action on the same basic issues.[1] Maryland has regulated surface coal mining within its two westernmost counties since the industry began there in

[1] *Virginia Surface Mining and Reclamation Ass'n v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), probable jurisdiction noted, Nos. 79-1538 and 79-1596 (October 6, 1980). Hereinafter cited as *Virginia Surface Mining*.

the 1940's. The initial statute was passed as an emergency measure in a special session of the Legislature in November of 1947. Comprehensive permitting and bonding requirements have been imposed from the beginning, and the law has been updated on numerous occasions since that time.[2] The Maryland General Assembly thus has evidenced its strong intent to regulate the industry so as to ensure full environmental control over all operations.

The Maryland coal industry is comparatively small on the national scale. However, the industry is important to the western Maryland counties, as it is typically in the Appalachian Mountain area. For calendar year 1979, over one thousand people were employed in Maryland directly in coal production.[3] In Garrett County, out of an estimated total population of 26,400 persons, 813 were employed in coal mining.[4] Over two million net tons of coal were produced in western Maryland in 1979[5] mostly by small operations.[6]

Maryland believes that surface mining in the State can be regulated effectively without causing small operators to go out of business, and believes further that the State government, rather than the federal government, is best able to accomplish this goal. Accordingly, the state has

[2] Maryland's statutes relative to surface coal mining are now codified as Natural Resources Article, Title 7, Subtitle 5, Md. Ann. Code.

[3] Fifty-Seventh Annual Report of the Maryland Bureau of Mines, page 4. Total employment of 1,097 persons; not including office, supervisory personnel, or independent truck haulers. Surface mining accounts for 65% of the total figure.

[4] Annual Report, page 4. Total population from Maryland Manual 1979-1980, page 484, issued by the Secretary of State.

[5] Annual Report, page 4. Total net tonnage of 2.7 million, 1.8 of which was taken by surface mining methods.

[6] Annual Report, pp. 6-13. Many permit holders in Maryland employ less than 5 individuals, and most employ under 15 employees. Few permit areas are greater than 40 acres, and over 100 strip mining permits were involved in the production of the 1.8 million tons noted above.

applied for and obtained "conditional" approval of a permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (hereinafter "SMCRA" or "the Act").[7] However, in so doing, Maryland has been required to comport its laws and regulations precisely to the provisions of SMCRA, and corresponding regulations promulgated by the Secretary of the U.S. Department of Interior. As indicated in this brief amicus curiae, Maryland believes not only that several of these requirements are inappropriate in this state, but that the federal government lacks Constitutional authority to impose them under penalty of preemption. It would appear that the Constitutional questions of concern to Maryland will be addressed by this Court in the present action, and in the *Virginia Surface Mining* case.

The Secretary of the Interior has demonstrated little or no regard for state judgment during the program approval process. For example, Maryland strongly objected to the absolute prohibitions on mining in certain areas required by SMCRA, § 522(e)(5) [30 U.S.C. § 1272(e)(5)]. For reasons more fully discussed in § II below, the State finds these prohibitions irrational in the absence of case-by-case review. Rather than file suit immediately, Maryland first proposed a means to cure these problems, by insertion of a general waiver provision.[8] This approach was totally rejected by the Secretary, with no supporting rationale, and the approval of the Maryland SMCRA Program is

[7] See, *Conditional Approval of Permanent Program Submission from the State of Maryland Under the Surface Mining Control and Reclamation Act of 1977*, 45 Federal Register 79430-79451 (December 1, 1980).

[8] 1980 Laws of Maryland, Chapter 740 enacted the prohibitions but allowed a waiver if mining was "approved by the owner or the appropriate jurisdictional agency, and the Department [of Natural Resources]." Natural Resources Article, § 7-505(b) (2) (v) and (vi), of the Annotated Code of Maryland.

currently conditioned, *inter alia*, upon further legislation to remove this waiver.[9]

Similarly, due to the large proportion of small operators in Maryland, the civil penalty prepayment requirement discussed in § III below will constitute a substantial hardship in this state. A small business with fewer than five employees rarely would have sufficient, excess working capital to be able to place the penalty amount into escrow while contesting enforcement actions. However, the Secretary has never relaxed his position that the SMCRA escrow provision must be contained in the Maryland Statute.[10] This provision has been enacted into law in Maryland, but the enactment was accompanied by advice of the Attorney General that the escrow requirement most likely is unconstitutional.[11]

Maryland is also concerned that the prime farmland provisions of SMCRA may adversely impact the industry. These provisions require that, if prime farmland is removed by surface mining, then upon restoration the area must be used again for crop production of equal or greater yield. In conjunction with the interim SMCRA program in Maryland, it has been determined that approximately 20,000 acres of potential prime farmland exist in Garrett County; with 9,000 acres in Allegany County.[12] Given the

[9] *Conditional Approval*, ibid n.6, Finding 12.1. As grounds for this condition, the Secretary states simply that "alternatives are not available to requirements of SMCRA."

[10] Maryland was apprised of this position from the start of the program development process, and consequently enacted the escrow provision in the 1980 Legislative Session, Chapter 740, § 7-517(b) (4) of the Natural Resources Article of the Annotated Code of Maryland.

[11] See, Letter of May 21, 1980 from Attorney General Stephen H. Sachs to Governor Harry Hughes, attached as Appendix A to this Brief, pp. 1a-3a.

[12] U.S. Department of Agriculture Soil Conservation Service Report entitled "Prime Farmlands of Garrett and Allegany Counties," prepared for the Maryland Bureau of Mines, April 1978.

totally inflexible SMCRA reclamation standard for such land, it is quite possible that the state's coal reserves under prime farmlands will not be recovered. As discussed in § I below, Maryland submits that the SMCRA prime farmland requirements are not within Congressional authority.

Maryland does not claim that the federal government has no legitimate interest in regulating many aspects of strip mining, particularly environmental impacts. However, SMCRA goes to remarkable extremes in attempting to dictate pure land use aspects once mining has ceased, and to absolutely prohibit strip mining in certain areas based on Congressional notions of public health and safety unrelated to interstate commerce. Provisions for prepayment of civil penalties are harsh, redundant to bond requirements, and very questionable in terms of due process. Implementation of these provisions is forced on the states under penalty of preemption, with no latitude for state discretion based on knowledge of particular local conditions. In so doing, this Act directly usurps traditional powers reserved to the states under the Tenth Amendment.

The State of Maryland believes that Congress has in this instance clearly overstepped its boundaries in our system of government. If SMCRA is allowed to stand as enacted, clear precedent will be established allowing almost any aspect of state sovereignty to be overridden upon the smallest Congressional finding, supportable or not, that interstate commerce is marginally involved. In this context, the interest of Maryland here goes beyond any particular impact on the state's mining industry. Maryland believes that this case raises basic questions of the remaining scope of state authority in our federal system. We sincerely urge this Court to firmly rule against these particular intrusions into state autonomy,

and generally to affirm the limits of Congressional authority.

SUMMARY OF ARGUMENT

Maryland urges affirmance of the District Court decision in the instant case, as well as the decision of the United States District Court for the Western District of Virginia in *Virginia Surface Mining and Reclamation Association v. Andrus*. In support of its position, Maryland respectfully submits that provisions of SMCRA properly were held unconstitutional, as follows:

Post-Mining Land Use

SMCRA contains many provisions which mandate specific uses of restored lands for at least five years after all coal removal. This has nothing to do with environmental control of strip mining. Congress has simply decreed that land, once strip mined, must be returned to an equal or better economic use. In the case of prime farmland, the use must be prime farmland and nothing else, possibly for a ten year period after mining.

The State of Maryland submits that Congress has no authority under the Commerce Clause to order that private property be used for farming, whether it has been strip mined or not, or that any other particular land use must occur after strip mining. After removal of coal and restoration of the land, the only interstate concerns stemming from the fact that strip mining once occurred on a piece of property are the residual environmental problems from the activity (acid run-off, to name the most often cited danger). Only provisions rationally related to these concerns may be enacted under the Commerce Clause. Furthermore, if the Tenth Amendment holds any remaining vitality, then the property owner must be able to employ the land according to agricultural, commercial, residential or whatever other uses are permitted under

state or local zoning authority. These choices may not be assumed by Congress.

Absolute Prohibitions on Mining

SMCRA provides that under no circumstances may mining occur "within 300 feet of any public building, school, church, community or institutional building, public park, or within 100 feet of a cemetery" § 522(e)(5) [30 U.S.C. § 1272(e)(5)]. The restriction applies even if the church, school, or other entity owns the property involved and wishes to mine it. No waiver is permitted, and the State of Maryland has been told expressly to eliminate its statutory waiver provision in this area as a condition of federal approval of the State SMCRA Program.

Maryland submits that there is no basis in the Commerce Clause for Congress to prevent a church from mining on its own property, or to require states to implement such an irrational provision under penalty of preemption of state authority over all aspects of strip mining. Furthermore, by enactment of this provision, Congress has invaded an area of traditional State authority over the health and welfare of its citizens, thereby overstepping the bounds of Congressional authority established by the Tenth Amendment.

Civil Penalty Prepayment

Finally, SMCRA contains an enforcement provision that requires full prepayment of a proposed penalty into escrow as a condition precedent to contesting either the penalty amount or the underlying violation of a citation. Maryland urges affirmance of the District Court decision in this action that the escrow requirement violates the procedural due process guarantees of the Fifth Amendment.

From a practical standpoint, there is no justification whatsoever for civil penalty prepayment by strip mine

operators. Since all permits are fully bonded, there can be no concern over collection of final assessments. Refusal to pay would simply lead to permit revocation and forfeiture of a far greater amount of money, plus loss of the right to engage in future mining activities. Thus, Congress can show no government interest at stake here, and the escrow requirement should be rejected even if the due process concerns were considered to be minimal.

In fact, this prepayment scheme is a substantial intrusion under the Fifth Amendment. There can be no dispute that property is actually taken in these circumstances, and it is no answer to point to the possible return of the escrow payment "with interest" (at 6% or the prevailing Treasury rate). Cash flow is an important factor in any business, and in many instances operators may be forced to borrow money in order to contest a violation. Given the prime interest rate at the date of this Brief (20% and climbing), the escrow requirement is clearly illuminated for what it is, a gross and substantial deprivation of property.

Under the Act, failure to place the entire amount of a proposed penalty into escrow results "in a waiver of all legal rights to contest the violation or the amount of the penalty" § 518(c) [30 U.S.C. § 1268(c)]. The Act itself contains no requirement for any type of hearing prior to payment. Maryland submits that there is patently no government interest served by such a taking prior to a hearing, and that the escrow requirement of SMCRA should be struck by this Court as a violation of the due process standards of the Fifth Amendment.

ARGUMENT

I.

THOSE SECTIONS OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 WHICH ATTEMPT TO REGULATE POST-MINING LAND USE ASPECTS UNRELATED TO ENVIRONMENTAL CONTROL ARE NOT WITHIN THE COMMERCE CLAUSE AUTHORITY OF CONGRESS, AND ARE VIOLATIVE OF THE TENTH AMENDMENT.

At one time, it could be firmly stated that the power of Congress to act under the Commerce Clause of the United States Constitution extended only to actual interstate activities, and not the means of producing goods which were intended for such commerce. Production was not commerce and, more specifically to this case, the mining of coal was held not to be interstate commerce. *Kidd v. Pearson,* 128 U.S. 1 (1888); *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344 (1921); *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1922); *Carter v. Carter Coal Co.,* 298 U.S. 238 (1935). The more modern analysis of Commerce Clause authority began when this Court shifted its focus to whether the activity which Congress desired to regulate affected interstate commerce in a direct or indirect manner. *Schecter Poultry Corp. v. U.S.,* 295 U.S. 495 (1934). Next, the inquiry was said to be whether a close and substantial relation to interstate commerce existed such that control was needed to protect commerce from burdens and obstructions. *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1936). Following some further refinement, *U.S. v. Darby,* 312 U.S. 100 (1940), a simple "rational basis" test finally was adopted as the basis for a proper exercise of the Commerce Clause power. *Wickard v. Filburn,* 317 U.S. 111 (1942). It is fair to say that this test still persists today, and that a federal statute may be sustained under the Commerce Clause if there is a "rational basis" for a finding by Congress that the regulated activity affects interstate commerce, and

"reasonable" or "rational" means have been selected for its regulation. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964); *Katzenbach v. McClung,* 379 U.S. 294, 303-304 (1964).

Despite such broadened deference for Congressional authority under the Commerce Clause, the State of Maryland urges that the rational basis test still represents an enforceable limit to Congressional authority. The Surface Mining Control and Reclamation Act of 1977 violates this limit in several of its provisions which attempt to regulate land use. Maryland would submit in the alternative that even if the SMCRA provisions can be sustained under a pure Commerce Clause analysis, Congress has exceeded the Tenth Amendment limits upon its authority to intrude into areas of state sovereignty, recognized by this Court in *National League of Cities v. Usery,* 426 U.S. 833 (1976).

A. Once mining is completed, the sole rational basis for Commerce Clause jurisdiction lies in environmental impacts on interstate commerce.

As noted in the federal Government's Brief in *Virginia Surface Mining,* the primary rational basis for the Act is to control environmental hazards from strip mining. (Br. pp. 24-25.) The mining of coal is, of course, also identified as a significant contributor to the Nation's energy requirements, § 101(b) [30 U.S.C. § 1201(b)]. However, the negative environmental factors are the focus of the statute; the law is not an effort to promote coal production.

Maryland submits that once mining is completed on a particular permit area, the only remaining effect of the mined lands on interstate commerce is continued environmental impact resulting from changes in the land due to the mining operation. Under the most liberal interpretation, the land is no longer being used in any manner

related to economic aspects of commerce. Thus, unless the fact that land was once used for such purposes is sufficient, there is no basis for continued Commerce Clause jurisdiction to protect the free flow of goods.

In its Brief in this appeal, the federal Government asserts that, aside from adverse environmental effects, there are at least two other separate and independent grounds for SMCRA Commerce Clause jurisdiction. Quoting from pp. 12-13 of the Brief:

> First, because coal produced from surface mines is a commodity sold in interstate commerce, Congress may act under the Commerce Clause to regulate the conditions under which that commodity is produced. *United States v. Darby,* 312 U. S. 100, 115, 122 (1941).
>
> Second, because surface coal mining operations adversely affect interstate commerce in agricultural products and other commodities by diminishing land productivity, Congress may exercise the Commerce Clause to protect those aspects of interstate commerce. See *Heart of Atlanta Motel, Inc., v. United States,* 379 U.S. 241, 256-257 (1964).

Maryland submits that these suggested Commerce Clause grounds would, if sustained by this Court, virtually eliminate any present restraint on Congressional authority under the Commerce Clause.

The first ground is basically a self-serving restatement of the evolved test for Commerce Clause jurisdiction, absent the requirement that a rational basis must exist between the identified impact on commerce, and the means chosen to regulate it. *Katzenbach v. McClung, supra.* However, this basis for Congressional authority fails once mining is completed. After the coal has entered interstate commerce, its continued status as a commercial commodity can no longer rationally support Congressional authority over the land which originally produced it.

The second ground proposed by Appellant would constitute a vast expansion of even the current liberal test for Commerce Clause jurisdiction. In essence, it suggests that Congress may regulate any activity that reduces or impairs land productivity. Following the logic of the Government's Brief at pp. 12-16, it is implied that Congress could have banned strip mining entirely on farmland simply upon a finding that some loss of crop productivity results from surface coal mining operations. Of course, SMCRA does not do this but, according to Appellants, it does "[balance] the competing interests of agriculture and surface coal mining . . . ." Brief p. 16. In other words, Appellants argue, Congress has the power to decide that a landowner, once engaged in farming, may not switch to surface coal mining unless he can guarantee that the full crop potential of the land will be restored.[13]

State and local zoning decisions now control whether land is used for industrial, agricultural, commercial, residential, recreational or other purposes. A change from one type of zoning to another may often favor one type of interstate commerce over another. However, if this choice alone establishes Congressional authority under the Commerce Clause then there is little if any state action not within the preemptive power of the federal government. Maryland respectfully submits that this Court should soundly reject any such expansion of Congressional authority.

[13] Of course, the unknown factor is for whose benefit the land is being restored for farming. Neither Congress nor the states can force the landowner to actually resume farming. Thus, he could simply wait for whatever period SMCRA requires, and then execute his intended use for the property. Or, worse for the country, he might not allow the coal on his property to be mined due to the resulting loss of control over the use of his land.

B. Many of the SMCRA post-mining land use requirements bear no relation to environmental protection, and are therefore invalid as not rationally adapted to the sole basis for Commerce Clause jurisdiction during this period.

In a general sense, environmental protection concerns related to strip mining deal with control of water pollution during the mining operation, restoration of the land to its original contour, reseeding and revegetating, and prevention of any future surface or subsurface adverse effects on water. Many SMCRA provisions properly address these concerns. However, there are several provisions throughout the Act which dictate actual land use during the term after mining in which regulatory authorities will determine whether proper reclamation has been accomplished. The District Courts, in this action and in *Virginia Surface Mining,* have identified several provisions of the Act which are invalid for this reason. Maryland would emphasize the following two sections as illustrative of the constitutional infirmity.

First, the Act establishes land use per se as a specific performance standard, § 515(b)(2) [30 U.S.C. § 1265(b)(2)]. Although contained in a section entitled "Environmental Protection Performance Standards", it is obvious on the face of the statute that the land use standard is totally unrelated to environmental protection. The actual text provides as follows:

> (b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to
>
> * * * * * *
>
> (2) restore the land affected to a condition capable of supporting the use which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long

> as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicant declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of federal, state, or local law.

Second, in the case of prime farmland, the focus on land use control is even more specific. The post-mining land use can only be cropland, and equivalent or higher levels of yield must be obtained. This is based on § 510(d) of the Act [30 U.S.C. § 1260(d)] which provides as follows:

> (d)(1) In addition . . ., if the area proposed to be mined contains prime farmland . . . the regulatory authority shall . . . grant a permit to mine on prime farmland if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area, under equivalent levels of management. . . .

Federal regulations on this point leave no room for flexibility, and have been sustained by the United States District Court for the District of Columbia in the consolidated review of all SMCRA regulations.[14] It is doubtful that any case can be made for demanding that cropland, once mined, must be used again as cropland in order to control interstate environmental impacts from the mining

[14] 30 C.F.R. § 785.17(d) (1), 44 Federal Register 15374 (March 13, 1979). The regulations state simply that "the approved proposed postmining land use of these prime farmlands will be cropland." As held by Judge Flannery in reviewing this requirement in *In Re Permanent Surface Mining Regulation Litigation,* Civil Action No. 79-1144 (D.D.C. May 16, 1980), Slip. Op. at p. 5:

> "Section 510(d) (1) corroborates the imposition of an additional requirement for mining on prime farmland: the land must be reclaimed and used as crop land."

operation.[15] Thus, there is no rational connection from this provision to the basis for Commerce Clause jurisdiction once mining activities have been completed.

The State of Maryland submits that these provisions, as well as the others identified by the District Courts, are not reasonably related to the prevention of environmental effects after the conclusion of mining operations. Although it may be reasonable to inquire into the intended post-mining land use of strip mined area so as to determine whether any such use might act to frustrate or impede environmental protections measures, it is not within the authority of Congress under the Commerce Clause to require specific land uses as conditions precedent to obtaining a strip mining permit.

C. The SMCRA post-mining land use requirements, even if within the Commerce power, are violative of the Tenth Amendment as impairments on an attribute of State sovereignty.

The landmark case of *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), holds that Commerce Clause authority, if available, may not be exercised by Congress in a manner so as to impair attributes of state sovereignty. Land use planning and control is such an attribute of state sovereignty.

As discussed above, if Congress need only point to the loss of a particular type of commerce, due to a zoning decision for example, to justify federal regulation, then there is no practical limit to Commerce Clause jurisdiction. Maryland submits that the Constitution does not allow such an expansion of the Commerce Clause per se, but that in any case, the Tenth Amendment stands as a

[15] If anything, the opposite is true. As specifically held by the District Court in this action, the prime farmland provisions actually increase water pollution. Finding No. 8, J.S. App. at 16a.

bar to federal intrusion into pure land use decisions, regardless of their indirect relation to commerce.

Land use planning and control is the means by which states and local communities decide the nature of their participation in our society: industrial or agricultural; high or low population density; and hundreds of other decisions on the basic character of an area. These decisions, virtually by definition, result in changes to an area's impact on interstate commerce. If Congress can decide that, for example, once a community is devoted to farming it may not change since that would cause a drop in agricultural productivity, then the federal government is directly dictating how the people in that community must make their living. Maryland submits that under our system of government, such power is reserved solely to states and local authorities who must daily answer to the citizens they govern. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). The wisdom of this approach is obvious, and should not be departed from in the name of strip mine control, or any other particular problem.

II.

THE SMCRA ABSOLUTE PROHIBITIONS ON SURFACE COAL MINING ARE NOT WITHIN THE COMMERCE CLAUSE AUTHORITY OF CONGRESS, AND ARE VIOLATIVE OF THE TENTH AMENDMENT.

A major feature of the Surface Mining Control and Reclamation Act of 1977 is the designation of certain areas as "unsuitable for surface coal mining", in which surface mining operations are banned outright, § 522 [30 U.S.C. § 1272]. As held by the District Court, where this section is addressed to non-federal lands, it is outside of the Commerce Clause and violates the Tenth Amendment.[16]

[16] Slip Opinion, pages 2 and 16 (J.S. App. 47a). Stricken provisions are §§ 522(a), (c), (d), (e) (4) and (5) [30 U.S.C. §§ 1272(a), (c), (d), (e) (4) and (5)]. Sections 522(b) and (e) (1), (2) & (3) deal with federal lands or federally designated Parks, Wildlife Areas, Trails, Wild and Scenic Rivers, and Historic Sites.

While urging this Court to affirm the District Court's decision in its entirety, Maryland would emphasize the particular constitutional problems found in § 522(e)(5).

Subsection (e)(5) contains per se, absolute prohibitions on surface coal mining. The full text of the statute is as follows:

> (e) After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—
>
> * * * * * *
>
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

From a policy standpoint, Maryland has no objection to the right granted here for a property owner to prevent or allow mining within 300 feet of his dwelling (although this grant is no more within the power of Congress than are the prohibitions in the remainder of the subsection, for the same reasons as discussed below). Maryland strongly objects to the absolute prohibitions in § 522(e)(5). As indicated in the Statement of Interest, Maryland first tried to temper them by insertion of a general waiver. However, this approach was rejected by the federal Office of Surface Mining.

Maryland submits that the absolute prohibitions on mining in SMCRA § 522(e)(5) are not rationally related to interstate commerce, and that Congress therefore may not preempt the state's control over strip mining for failure to enact these provisions. The Secretary offers no argument to the contrary here, and states only that "[the prohibitions] are plainly directed toward the purpose of ensuring that the extraction of coal does not endanger life and

property in mining communities." (Br. p. 19). This is not a basis for Commerce Clause jurisdiction. *Wickard v. Filburn, supra.* Furthermore, the means selected here are not rationally adapted to the identified problem. *Heart of Atlanta, supra.*

A 300 foot buffer zone may offer some protection in some circumstances, but why should a dwelling owner be able to waive this requirement when a church or park may not. Schools may not be open in the summertime, yet the SMCRA prohibition still holds. Under OSM regulations, "community or institutional buildings" include power plants, water supply and sewage treatment buildings, and historic buildings. 30 C.F.R. § 761.5(d), 44 Federal Register 15342 (March 13, 1979). None of these may waive the restriction, even if the buffer zone is owned by the party itself. A cemetery may be long abandoned, or may have its own internal buffer zone, but these factors are not allowed to be considered by a state permitting agency. In short, there is no ability to make an informed decision on the actual need for safety-related permit conditions in particular circumstances. In some cases, more than 300 feet may be required. Other circumstances may require no setbacks; simple time-of-day or time-of-year restrictions may suffice. Maryland submits that such decisions must be made on a case by case basis, and that the absolute prohibitions of SMCRA § 522(e)(5) fail the test of rationality even assuming, *arguendo,* that such areas of regulation are within Congressional authority.

For similar reasons as discussed above, the SMCRA absolute prohibitions should also be considered violative of the Tenth Amendment. The aspect of state sovereignity being intruded upon here is the basic state authority over the health and welfare of its citizens. Maryland submits that there is no state attribute more fundamental, and that any Congressional action taken purportedly under

the Commerce Clause may not usurp this function without clear and compelling grounds rooted in interstate commerce. There are no such grounds for the SMCRA § 522(e)(5) absolute prohibitions.

As shown by the lack of arguments on this point in the Secretary's Brief, there is really nothing that can be said for § 522(e)(5) except that it is obviously aimed at protecting life and property. (Br. p. 19). However, this section is not related to the life and property of the people actually engaged in surface coal mining.[17] It is aimed at bystanders, many of whom might wish to be involved and would profit from the operation.[18] Maryland submits that, to the extent such people need to be protected from themselves by appropriate safety regulations, such actions are peculiarly within state authority under the Tenth Amendment. As in the case of land use decisions, the wisdom of this approach is simply and clearly to leave basic health and safety decisions in the hands of those elected officials who must daily answer to the people they govern.

[17] Admittedly, Congress may have some authority over the health and safety of people producing products that enter interstate commerce. See generally, *Federal Mine Safety and Health Act of 1977*, Pub.L.No. 95-164, 91 Stat. 1290-[30 U.S.C. § 801 et seq]; and *Occupational Safety and Health Act of 1970*, Pub. L. No. 91-596, 84 Stat. 1590 [29 U.S.C. § 651 et seq].

[18] As to those unwilling bystanders, there is little if any connection between these people and interstate commerce so as to sustain the Congressional action here in any balancing of the federal and state interests involved. Simply being in the vicinity of an activity related to interstate commerce is obviously not sufficient to override the Tenth Amendment.

III.

FIFTH AMENDMENT DUE PROCESS IS VIOLATED BY THE CIVIL PENALTY PROVISION OF SMCRA WHICH REQUIRES THAT ALL PROPOSED ASSESSMENTS BE PREPAID IN ESCROW AS A CONDITION PRECEDENT TO CONTESTING EITHER THE PENALTY AMOUNT OR THE UNDERLYING VIOLATION OF A CITATION.

Maryland does not challenge the authority of Congress to employ civil penalty provisions in conjunction with enforcement actions under the Surface Mining Control and Reclamation Act of 1977. The basic SMCRA requirements here are quite similar to those used in other environmental statutes such as the Clean Air Act and the Clean Water Act. However, SMCRA contains a unique and important additional requirement: any civil penalty proposed by an administrative agency in conjunction with an enforcement action must be prepaid in full by the operator as a condition precedent to challenging the penalty amount or the underlying violation. Section 518(c) [30 U.S.C. § 1268(c)]. Maryland is aware of no precedent for this requirement.

The statute itself contains no provision for any type of hearing prior to the necessity to prepay civil penalty assessments as a condition of challenging the enforcement action. Obviously, this raises important questions of procedural due process under the Fifth Amendment of the Constitution. To date, all courts that have considered this issue have rejected the SMCRA provision on this ground.[19]

The present test for validity of such provisions involves a balancing of the government interest involved versus the private interest affected. *Matthews v. Eldridge*, 424 U.S. 319 (1975). As discussed below, Maryland submits that the SMCRA escrow prepayment requirement is totally incap-

[19] *Star Coal Co. v. Andrus*, Civ. 79-171-2 (S.D. Iowa, Feb. 13, 1980) Slip Op. 18-19, appeal pending, No. 80-49; and *Virginia Surface Mining*.

able of satisfying this test, and should be rejected by this Court as a clear violation of the Fifth Amendment.

A. The escrow provision constitutes a substantial deprivation of private property.

It cannot be disputed that the private interests involved here are deprivations of property protected by the Fifth Amendment. Monetary takings prior to a hearing have constituted the larger majority of the cases decided under the principles at issue here.[20] In the circumstances of SMCRA civil penalty prepayments, at least three substantial impacts are possible.

First, at a minimum, even if an operator is successful in challenging a civil penalty assessment, the law acts to deprive him of the use of his money for a significant period of time. It is no answer to point to the possible return of the escrow payment "with interest" (at 6% or the prevailing Treasury rate). The need for working capital is a basic requirement for efficient operation of any business. In a state such as Maryland, where many operations are small businesses, the prepayment requirement is an obvious substantial hardship. In the case of *Fuentes v. Shevin,*[21] this Court held that the Fifth Amendment right to be heard exists prior to even a temporary, non-final deprivation of property. At its best, the SMCRA escrow prepay-

[20] *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969) (garnishment of wages without prior hearing held unconstitutional); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (termination of welfare benefits without prior hearing held unconstitutional); *Matthews v. Eldridge,* 424 U.S. 319 (1975) (termination of disability benefits requires prior hearing — but not necessarily a full evidentiary hearing).

[21] 407 U.S. 67, 88 (1972). Replevin of household goods for default of installment payments. Creditor was allowed to take possession solely on his assertion of non-payment, backed by a bond. Fact that goods would be returned if claim was invalid held irrelevant to Fifth Amendment hearing requirement.

ment scheme falls squarely within this holding, and should be invalidated.[22]

Second, in addition to the automatic temporary deprivation, the magnitude of SMCRA civil penalties makes it clear that small operators may be forced to borrow money in order to make escrow prepayments so as to challenge violations.[23] Given the prime interest rate at the date of this Brief (20% and climbing), there can be no doubt that the requirement to prepay proposed assessments can result in a permanent deprivation of a company's assets. Maryland submits that this is undeniably an effect prohibited by the Fifth Amendment in the absence of a prior hearing.

Third, in some circumstances, it is possible for the escrow prepayment requirement to result in the closing of a mine. Although a mine operator may be convinced that he has been improperly cited for a violation of the Act, he may be unable to prepay the assessments resulting from continued operation past a compliance deadline (basic assessment plus minimum of $750.00 per day mandatory penalty after deadline). If the disputed violation relates to the basic method of operation on the permit area, there is no option but to cease mining until resolution of the legal

[22] Maryland is incredulous at the statement in Appellant's Brief on page 70 that: "The 'refund-with-interest' provision in Section 518(c) ensures that operators who prevail on administrative or judicial review will suffer no financial injury." If all the government need do is pay interest, then the Fifth Amendment has indeed lost its effectiveness.

[23] SMCRA civil penalties may range up to $5,000 per violation, with each day of continuing violation being deemed a separate violation § 518(a) [30 U.S.C. § 1268(a)]. The federal Office of Surface Mining itself has indicated that the average penalty per violation is approximately $2,000.00, and that the $750.00 per day penalty once a deadline for compliance has passed can result "in clearly excessive amounts considering the nature and effects of the underlying violations of the Act" 45 Fed. Reg. 5540 (Jan. 23, 1980).

issues. In this regard, the civil penalty prepayment scheme shows a clear potential for drastic consequences.

This scenario is not hypothetical, but actually occurred to the Black Creek Mining Company of Norton, Virginia, as described by Judge Williams in striking the provision at issue here in the companion case of *Virginia Surface Mining*, J.S. App. 69a-70a. Given this effect, Maryland submits that the escrow prepayment provision clearly involves substantial private interests under the Fifth Amendment.

B. There is no governmental interest served by the SMCRA civil penalty escrow provision.

In contrast to the private interests at stake, there are no governmental interests served by the escrow provision. The notion that prepayment is needed "to avoid the problem of non-collection of fines" is untenable in the context of a fully bonded strip mine operation.[24] As specifically required by SMCRA § 509 [30 U.S.C. § 1259] all permits must be backed by bonds or other security sufficient to complete properly the operation, but not less than $10,000. Thus, any failure to pay a final assessment would simply result in permit revocation and forfeiture of the outstanding security. A further consequence of forfeiture is disqualification for future mining permits. § 510(c) [30 U.S.C. § 1260(c)].

Given these protections, Maryland believes that the perceived need by Congress for prepayment of civil penalties could be rejected on its face by this Court. However, under any consideration, it is clear that the private interests impacted by this provision greatly out-

[24] Senate Report No. 95-128, 95th Cong., 1st Session, at page 59. Cited by Appellants in their Brief in *Virginia Surface Mining*, page 70, incorporated by reference into this action at page 36 of Appellants Brief.

weigh whatever strength lies in the government's concerns, and that the escrow provision fails the test of *Matthews v. Eldridge, supra,* for a valid taking of property without a hearing under the Fifth Amendment.

C. The informal "assessment conference" provided by the Office of Surface Mining does not substitute for the required Fifth Amendment hearing.

Although the Act itself contains no requirement for a hearing of any kind prior to prepayment of proposed penalties into escrow, the Secretary has attempted to cure the constitutional defect here by providing an "assessment conference" prior to payment.[25] Maryland doubts that agency regulations, as a general matter, are ever sufficient to moot a clear constitutional infirmity on the face of a statute. However, this issue need not be reached in the instant case since the adopted "assessment conference" would not be sufficient even if contained in the statute.

The basic Fifth Amendment right has been described as the right to be heard "at a meaningful time and in a meaningful manner." *Matthews, supra; Armstrong v. Manzo,* 380 U.S. 545 (1965). The "time" need only be before any deprivation, a test satisfied by the Secretary's assessment conference. However, the conference does not provide a hearing in a meaningful manner as required. At most, the conference represents an opportunity to argue for a lower assessment based on the rather exotic point system established under the regulations.[26] There is no independent, unbiased hearing examiner, and it is extremely doubtful that the assessment officer has the power

[25] 30 C.F.R. § 845.18; 44 Fed. Reg. 15463 (March 13, 1979).

[26] 30 C.F.R. § 845; 44 Fed. Reg. 15461 (March 13, 1979). OSM regulations which would have required states to use the same system have been remanded. § 732.15(b) (7) and § 840.13(a). *In Re Permanent Surface Mining Regulation Litigation,* Civil Action No. 79-1144 (D.D.C. 1980), 14 ERC 1083, 1089 (February 26, 1980), and Slip Opinion pp. 56-57 (May 16, 1980).

to reduce any proposed penalty to zero. Where a cessation order has been issued under § 521 of the Act [30 U.S.C. § 1271], some amount of civil penalty is mandated by § 518(a) [30 U.S.C. § 1268(a)]. Thus, in these instances, the Secretary cannot correct the statutory scheme of prepayment prior to an adjudication on the underlying violation.[27] In no case is a sufficient hearing held on the amount of a penalty without prepayment.[28]

In summary, there is no regulation or argument advanced by the Secretary which cures the basic violation of Fifth Amendment due process inherent in the SMCRA civil penalty prepayment requirement. All reviewing courts to date have stricken this novel provision on Fifth Amendment grounds, and this Court should affirm the District Courts' decisions on this issue.

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[27] The Secretary argues that a hearing on the fact of a violation may be obtained under § 525 without regard to § 518 escrow prepayment (in apparent contradiction to the plain meaning of § 518(c)). *Virginia Surface Mining*, Br. pp. 68-69. This may be possible, but is strictly a matter of timing. Since proposed assessments are required by § 518(c) within 30 days of a notice or order, and prepayment within 30 days thereafter, a maximum of 60 days is available to adjudicate the violation. (The Secretary can issue a proposed assessment earlier than 30 days from the notice and thus shorten the period accordingly.) However, under § 525, the Secretary has 30 days to decide cases arising under cessation orders, and more if he grants temporary relief from the order. There are no deadlines for standard violation notices. In short, it is fair to assume that few operators will obtain a decision on an alleged violation prior to the deadline for escrow prepayment of a proposed civil penalty.

[28] On page 69 of the Secretary's Brief in *Virginia Surface Mining*, it is expressly acknowledged that:

> Accordingly, if a mine operator wishes to contest the amount of a proposed penalty as well as the fact of the underlying violation, it [sic] must seek review under Section 518, and prepayment of the penalty into escrow is a precondition of that review.

CONCLUSION

The District Court's decision was correct in all respects and, accordingly, should be affirmed.

Respectfully submitted,

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APPENDIX A

Offices of
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May 21, 1980

Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, Maryland 21404

Re: Senate Bill 975

Dear Governor Hughes:

We have reviewed Senate Bill 975 for constitutionality and legal sufficiency and, although we have no objection to the bill becoming law, we must point out a serious constitutional question raised by one of its provisions.

Senate Bill 975, among other things, attempts to conform Maryland's strip mining laws to the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328. In so doing, the bill amends § 7-517(b)(4) of the Natural Resources Article to provide for a civil penalty scheme patterned after 30 U.S.C. § 1268(c). In essence, this amendment provides that a person adversely affected by a proposed civil penalty assessment imposed after the issuance of cease and desist order or notice of noncompliance may request an adjudicatory hearing on the questions before the Department of Natural Resources. However, "at the time of the request the full amount of the penalty must be paid over to the Secretary for placement in an escrow account pending completion of administrative

and judicial review of the assessment." § 7-517(b)(4). In addition, this provision states:

> Failure to forward the full amount to the Secretary within 30 days of an assessment order shall result in a waiver of all legal rights to contest the amount of the penalty or the underlying violation. If it is eventually determined that no violation occurred, or the amount of the penalty is reduced, the Secretary shall remit within 30 days the appropriate amount to the person, with interest at the rate of 6 percent.

In our view, this penalty prepayment provision may offend due process in violation of the Fourteenth Amendment of the United States Constitution. Substantial penalties, which may exceed $5,000 per day for each violation, can be imposed on a suspected violator before he can contest either the violation or the amount of the penalty. Moreover, in our view, such a deprivation of property is not remedied by the fact that the money is placed in escrow and may be returned in the future with interest. Although such a scheme may very well deter violation of the strip mining laws, it also may force settlement and deter appeals regardless of the merits. In addition, it would appear to strike hardest at the less wealthy operators. The federal penalty provision, along with other features of the federal act, are the subject of constitutional challenge in *Virginia Surface Mining and Reclamation Assoc., Inc. v. Anderson*, ___ F. Supp. ___, No. 78-0224-B (N.D. Va., Jan. 3, 1980), jurisdictional statement filed ___ U.S. ___, No. 79-1596 (April 11, 1980)[1] and *Star Coal v. Anderson*, ___ F. Supp. ___, No. 79-1712 (S.D. Iowa, preliminary injunction issued Feb. 13, 1980).

The Department of Natural Resources has been advised that all states must duplicate the penalty prepayment

[1] Also, at issue in that case is the constitutionality of absolute restrictions on mining within certain distances of public and private places and of absolute requirements that all violations be corrected within 90 days. Because S.B. 975 adds these provisions to State law, but with some moderating features, we do not believe they are facially unconstitutional.

provision in their laws to obtain federal approval of their strip mining enforcement program. If Maryland's program does not contain this feature, it may be disqualified, with the result being that the federal government will enforce federal law in Maryland, including the prepayment penalty scheme. For these reasons, we urge that the bill be signed so that these provisions will be enforced by State officials sensitive to the constitutional questions raised by the legislation.

Very truly yours,

Stephen H. Sachs
Attorney General

SHS:RAZ:ss
cc: Honorable Fred L. Wineland
Judson P. Garrett, Jr., Esq.
F. Carvel Payne
Honorable Harry J. McGuirk